STATE OF MICHIGAN

COURT OF APPEALS

BARUCH SLS, INC., Petitioner-Appellant,	UNPUBLISHED April 21, 2015
v	No. 319953 Tax Tribunal
TOWNSHIP OF TITTABAWASSEE, Respondent-Appellee.	LC Nos. 00-0395010; 00-0415093

Before: OWENS, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Petitioner appeals as of right from an order of the Michigan Tax Tribunal denying its request for an exemption from real and personal property taxes under MCL 211.7o and MCL 211.9 for the 2010, 2011, and 2012 tax years. We affirm.

I. FACTS

Petitioner is a Michigan non-profit corporation registered as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. Petitioner owns and operates several adult-foster care and assisted living facilities throughout Michigan, including Stone Crest Assisted Living ("Stone Crest"), the facility at the heart of this case. Stone Crest is located in Freeland. Petitioner's articles of incorporation and by-laws indicate that it was organized to provide home healthcare services and "other senior lifestyle services to the general public." Petitioner subscribes to a faith-based philosophy in its operation, although it is not affiliated with any specific denomination or church. In the admissions process, petitioner does not consider race, religion, color or national origin. However, an applicant seeking admission to Stone Crest is required to document the existence of an assessment plan, a resident-care agreement, and a healthcare appraisal that is not more than 90 days old. A resident-care agreement includes a description of the services provided, service fees, and additional costs in addition to the basic fee.

Petitioner maintains an "income-based program" whereby a resident's monthly charge is reduced to a level based on the amount of their income. Applicants for the program are required to show that they have the ability to pay some amount toward their living arrangement and care (even if it is solely from Medicaid or Medicare), and Stone Crest has not admitted any resident who has not had some ability to pay. Stone Crest does not provide free housing or care.

The Tribunal ruled that Stone Crest was not entitled to a charitable exemption under MCL 211.7o based on the factors set forth in *Wexford Med Group v City of Cadillac*, 474 Mich 192, 215; 713 NW2d 734 (2006). The Tribunal held that petitioner offered its charity on a discriminatory basis, that petitioner had not met its burden to prove that the fees it charged were not more than what was needed for its successful maintenance, and that petitioner's overall nature of operation was commercial.

II. STANDARD OF REVIEW

Our review of this case is guided by the following standard:

> The standard of review for Tax Tribunal cases is multifaceted. Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. We deem the tribunal's factual findings conclusive if they are supported by competent, material, and substantial evidence on the whole record. [*Id.* at 201 (internal quotation marks and citations omitted).]

The substantial evidence standard signifies a level reaching "more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal." *Leahy v Orion Twp*, 269 Mich App 527, 529-530; 711 NW2d 438 (2006) (citation omitted).

III. ANALYSIS

It is well settled that a petitioner seeking a tax exemption bears the burden of proving, by a preponderance of the evidence, that it is entitled to the exemption. *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002). The Legislature must expressly grant an exemption from the state taxing power; it will not be implied. *VanderWerp v Plainfield Twp*, 278 Mich App 624, 627-628; 752 NW2d 479 (2008) (citations omitted). Tax exemptions must be strictly construed in favor of the taxing body because tax exemptions upset the desirable balance achieved by equal taxation. *Mich Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976). In an appeal from an order of the Tax Tribunal, the appellant bears the burden of proof. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 198; 699 NW2d 707 (2005) (citation omitted).

MCL 211.7o(1) states, "Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act." Although the Legislature has not defined "charitable institution" as it is used in MCL 211.7o, our Supreme Court in *Wexford*, 474 Mich at 204-215, discussed what a claimant must show to be granted a tax exemption as a "charitable institution." In that case, the Supreme Court favorably quoted the definition of "charity" set forth in *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348-349; 330 NW2d 682 (1982):

> "[Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [*Wexford*, 474 Mich at 214, quoting *Retirement Homes*, 416 Mich at 348-349, quoting *Jackson v Phillips*, 96 Mass (14 Allen) 539 (1867) (alterations in original).]

The *Wexford* Court then set forth six factors to consider when determining whether an organization is a "charitable institution:"

> (1) A "charitable institution" must be a nonprofit institution.
>
> (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.
>
> (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
>
> (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
>
> (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year. [*Id.* at 215.]

In this case, the Tribunal ruled that petitioner failed to satisfy the third, fifth, and sixth factors of the *Wexford* test. Although a close call, the Tribunal's conclusion was right on the third factor. We therefore must affirm.

A. DISCRIMINATORY BASIS

Petitioner first argues that the Tribunal erred in finding that petitioner offered its charity on a discriminatory basis.

In *Wexford*, the Supreme Court stated that it is an "indispensable principle" that "the organization must offer its charitable deeds to benefit people who need the type of charity being offered." *Id*. at 213. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's "charitable deeds." *Id*. The Court continued:

> This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers. [*Id.*]

Two cases illustrate the discriminatory basis factor of *Wexford*. On one end of the spectrum is *Mich Baptist Homes*, which *Wexford* cited heavily. See *Wexford*, 474 Mich at 207-211. In that case, one of the plaintiff-charity's nursing homes, Hillsdale Terrace, was not granted a tax exemption. *Mich Baptist Homes*, 396 Mich at 666-668. Among the reasons was that the residents paid substantial fees, up-front, and had to be reasonably healthy in order to live there. *Id*. at 670-672. Significant to the Court's analysis was that a prospective resident's ability to pay was very much a determining factor for admission. *Id.* While Hillsdale Terrace offered reduced rates to four (out of 72) residents and waived the fees for one other, the Terrace sought to avoid this situation by requiring detailed financial disclosures. *Id*. at 667-668. Thus, the Court held that even though the Terrace claimed the failure to pay the monthly service charge would not result in an eviction, the other facts undermined the Terrace's ostensibly charitable objectives. *Id*. at 670-672.

On the opposite end is *McFarlan Home v City of Flint*, 105 Mich App 728, 732; 307 NW2d 712 (1981). There, although the retirement home obtained only a partial tax exemption, no exemption was denied because of unfair discrimination. Specifically, retirement home residents were required to pay a $400 monthly fee. However, the Court found that fact inconsequential since—unlike Hillsdale Terrace—the McFarland Home's trust fund paid the residents' actual costs of care. *Id*. at 732-733. That the residents were required to be ambulatory also did not matter since the home was not licensed to provide more extensive care. *Id*. at 733. The Court also contrasted McFarland Home's admission policy, noting that applicants were admitted predominantly on a first-come, first-serve basis, with no preconditioned financial disclosure. *Id*. Further, the home had never removed a resident for lack of funds. *Id*.

In the case at hand, petitioner purports "to provide home health care services" and "other senior lifestyle services to the general public." Among its goals is to serve those in the twilight of life who cannot otherwise afford full-cost assisted living and to assure them a permanent, stable living situation. To this end, when one of petitioner's residents is unable to pay petitioner's alleged below-market costs, his or her eligibility for Medicaid (and the government assistance paid to petitioner) qualifies the resident for the income based program (and suffices to meet the resident's monthly payment), although that amount is far less than the amount petitioner otherwise charges other residents.

Were we to stop here, petitioner may be in the clear. Indeed, petitioner does not discriminate among its residents eligible for its income based payment program. The same

criteria apply to all. Moreover, "a nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of service." *Wexford*, 474 Mich at 210 (quotation marks and citation omitted).[1]

Instead, what ails petitioner is the stated scope of its charity care policy. Specifically, petitioner's charity care policy is *not* broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Instead, petitioner's *only* stated charity care policy is the income based program, itself. But to be eligible for the program, one must first be a resident. And to be a resident, one must have the ability to pay at the outset. If not, petitioner will not accept the applicant. This means that in order to be eligible for the income based program, one must have been able to pay, at some point, more than what government assistance would offer. Indeed, petitioner has never admitted any resident who did not in the beginning have the ability to pay more than this. So while it is true that petitioner does not discriminate among its residents who are eligible for the income based program, entry into this charity is conditioned upon the Stone Crest residency requirements, which in turn, are conditioned on the ability to pay. This type of pay-to-play policy means petitioner does not "serve[] any person who needs the particular type of charity being offered." *Id*. at 215.

In this respect, then, this case falls more in line with *Mich Baptist Homes* than *McFarlan*. While not exactly akin to Hillsdale Terrace (which had a more exacting admissions policy), both petitioner and Hillsdale Terrace at the outset emphasized the ability to pay and required financial disclosures. The McFarland Home, on the other hand, had no preconditioned financial disclosure and subsidized care for *all* residents. While it may be true that petitioner in this case subsidizes many, if not all, residents whether in the income based program or not, the record reflects that the income based program is petitioner's *only* charity-based activity. In other words, petitioner's only charity-based activity was the subsidizing of those in the income based program, who, at some point, had already paid for their eligibility to be there. "[T]he Legislature did not intend that housing for the elderly should be tax exempt [for] only those persons who can afford the cost of the housing benefit." *Retirement Homes*, 416 Mich at 353 (WILLIAMS and COLEMAN, JJ., dissenting), citing *Mich Baptist Homes*, 396 Mich at 671-672. Given petitioner's

[1] In light of this, the Tribunal's indictment of petitioner's policy requiring 24 months of full payment before entry into the program holds no water where accommodations were routinely made. By the same token, the Tribunal's faulting petitioner's written policy of making only 25 percent of its rooms available for the income based program is misplaced where petitioner utilized nearly 40 percent of its space for that program. And in any event, the law does not require petitioner to "guarantee" the availability of its charity, as the Tribunal's opinion seems to imply. If that were so, many organizations would cease to exist as charities if their funding were insufficient to "guarantee" their services.

own narrow definition of charity-based activity, then, petitioner cannot clear the discriminatory basis hurdle of *Wexford*.[2]

B. CHARGING FOR SERVICES

While petitioner's failure to satisfy part three of the *Wexford* test is dispositive, it bears emphasis that the Tribunal's two other grounds for denying petitioner's tax exemption were incorrect. On this score, the Tribunal first erred in ruling that petitioner's charges for services were more than what was necessary for its successful maintenance. *Wexford*, 474 Mich at 215 ("A 'charitable institution' can charge for its services as long as the charges are not more than what is needed for its successful maintenance.").

Petitioner's evidence satisfied this criterion. It established that Stone Crest's revenue in 2010, 2011, and 2012 was insufficient to cover its costs based on Stone Crest's operating losses for those tax years (which, like the charitable entity in *Wexford*, were subsidized by petitioner from its corporate accounts). Contributing this financial shortfall was the over-admission of residents to its income-based program (upwards of 40 percent of the residents were in the program).

In ruling otherwise, the Tribunal erred in at least two respects. First, the Tribunal improperly focused on the testimony of petitioner's representative comparing petitioner's rates to others' in the community ($3,200 monthly at Stone Crest vs. $3,700 monthly elsewhere). This is not the benchmark for determining whether petitioner's charges were appropriate for charitable purposes under these circumstances. To the contrary, *Wexford* expressly cited case law holding that where an institution charges some patients but not others and the institution's total receipts were less than its total disbursements, the institution's financial shortfall due to charitable activity may be inferred where the respondent has not shown otherwise. *Wexford*, 474 Mich at 205-506, citing *Mich Sanitarium & Benevolent Ass'n v Battle Creek*, 138 Mich 676, 682-683; 101 NW 855 (1904). Respondent has not rebutted the other evidence noted previously, and the Tribunal's focus on the testimony about other facilities was therefore misplaced. Petitioner's evidence was sufficient.

Equally in error was the Tribunal's speculative disregard of petitioner's operating losses. On this point, the Tribunal justified ignoring those losses because petitioner incurred them in the early stages of operating Stone Crest. But the record does not support this conclusion. Rather, as already explained, the record reveals that increased participation in the income based program caused at least part of petitioner's financial bleeding. Petitioner simply did not charge more than

[2] Assuming petitioner did subsidize other residents and more broadly defined its charity to include all those applicants who could afford to pay something beyond government assistance, albeit less than the market rate, petitioner would have no problem clearing the discriminatory basis hurdle of *Wexford*. We cannot reach that conclusion on the record before us today, however.

needed for its successful maintenance, and the Tribunal's reasoning to the contrary is purely conjecture.

C. OVERALL NATURE OF THE ORGANIZATION

The Tribunal also erred when it concluded that petitioner's overall nature was commercial, not charitable. In *Wexford*, the Supreme Court explained that "[a] 'charitable institution' need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a 'charitable institution' regardless of how much money it devotes to charitable activities in a particular year." *Wexford*, 474 Mich at 215. The *Wexford* Court emphasized that "it is clear that the institution's activities as a whole must be examined; it is improper to focus on one particular facet or activity." *Id.* at 212. This evaluation necessitates consideration of "the overall nature of the institution, as opposed to its specific activities." *Id.* at 213. In other words, "[t]he substance of an arrangement rather than its form should be the guiding principle in determining ownership and tax exemption status." *Nat'l Music Camp v Green Lake Twp*, 76 Mich App 608, 614; 257 NW2d 188 (1977) (citations omitted).

Applying these principles, it was the Tribunal's focus on petitioner's specific activities out of context, rather than on the substance of Stone Crest's arrangement that led the Tribunal astray. In this regard, the Tribunal greatly emphasized petitioner's "direct competition" with other facilities, noting petitioner's market level pricing structure and distribution of promotional material. But as for the former, the evidence revealed that petitioner's pricing structure was actually lower than the standard structure in the community. And as for the latter, the Tribunal disregarded clear testimony explaining that such measures were necessary to educate the public and counteract the "bad feelings" about the tenant that previously ran the facility. Such "marketing" does not transform petitioner into a commercial organization. The Tribunal's additional focus on the lack of charitable solicitation plans and donations likewise changes nothing where petitioner, itself, funded the financial shortfall, just like the entity in *Wexford*. Surely, a charity's status is not dependent on its donors, and, as explained, the Tribunal's speculative reference to the petitioner's start-up costs is not sufficient to undermine this point. Finally, contrary to its own written policies, petitioner's de facto practice was to accept more residents to the income based program than the written policy permitted and to make exceptions for others who had not otherwise lived at the facility for 24 months. Again, just because petitioner otherwise charges residents more who are able to pay more does not render its purpose commercial. *Wexford*, 474 Mich at 217. In short, the Tribunal's failure to place petitioner's specific activities in context renders its ruling on this point erroneous. Petitioner's overall nature is charitable.

IV. CONCLUSION

The Tribunal erred in ruling that petitioner's charges for services were more than what was necessary for Stone Crest's successful maintenance and that petitioner's overall nature in running Stone Crest was not charitable. However, because on this record petitioner could not establish that it did not offer its charity on a nondiscriminatory basis, the Tribunal did not err in holding that petitioner was not a charitable institution within the meaning of *Wexford*, and that it

was not entitled to the real and property tax exemption for charitable institutions set forth in MCL 211.7o.

Affirmed.

No costs, a public question involved. MCR 7.219.

/s/ Donald S. Owens
/s/ Christopher M. Murray